87 1134

Supreme Court, U.S.
FILED
JAN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CONSULATE GENERAL OF NIGERIA and
FEDERAL REPUBLIC OF NIGERIA,
Petitioners,

VS.

CATHERINE JOSEPH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CAROL JOHNSON RODUIT
214 Duboce Avenue
San Francisco, California 94103
(415) 626-0979
Counsel for Petitioners

January 5, 1988

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

47pp

QUESTIONS PRESENTED

1. Whether a Consulate waives sovereign immunity under 28 U.S.C. § 1605(a)(1) by entering into a standardized lease agreement containing the following language:

   > In the event that any action shall be commenced by either party hereto arising out of, or concerning this lease or any right or obligation derived therefrom, then in addition to all other relief at law or equity, the prevailing party shall be entitled to recover attorney's fees as fixed by the court.

2. Whether 28 U.S.C. § 1605(a)(1) requires that an employee of a Consulate have authorization from the sovereign state to waive immunity, before an implied waiver of immunity can be found based on a contract signed by that employee.

3. Whether 28 U.S.C. § 1605(a)(1) requires the Consulate's knowing and intentional waiver of immunity under the facts of this case.

4. Where a Consulate leases property to house consular officials, does the federal court have jurisdiction to hear a breach of contract claim against the foreign state under 28 U.S.C. § 1605(a)(2), where the alleged breach of contract consisted of damage to property, the same torts providing a basis for jurisdiction under the non-commercial tort exception, 28 U.S.C. § 1605(a)(5).

5. Whether a Consulate's lease of residential property subjects the sovereign to jurisdiction of United States courts under the FSIA commercial activity exception, 28 U.S.C. § 1605(a)(2), where the property was leased to provide housing for consular officials in accordance with the Vienna Convention on Consular Relations, not for profit.

6. Whether a foreign state is subject to the jurisdiction of courts of the United States under 28 U.S.C. § 1605(a)(5) for the alleged tortious acts of its consular employee, acting outside the scope of his consular functions, where no public interest or function of the foreign state was furthered by the alleged tortious acts.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, the Federal Republic of Nigeria (Nigeria), the Consulate General of Nigeria (Consulate), and A. A. Olalandu, a former consular officer; and the respondent Catherine Joseph.

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties	ii
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement of the case	3
Reasons for granting the writ	3
I	
Conflicts among district and circuit courts regarding findings of implied waiver of foreign sovereign immunity demand a judicial construction of 28 U.S.C. 1605(a)(1)	3
II	
This case presents a significant issue of statutory interpretation and application involving federal jurisdiction over foreign sovereigns under the commercial activities exception	6
III	
The Ninth Circuit's broad interpretation of the noncommercial tort exception to sovereign immunity extends California's tort law beyond its own broad parameters and conflicts with decisions of other circuits	8
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

	Page
Alma W. v. Oakland Unified School District, 123 Cal. App. 3d 133, 179 Cal.Rptr. 287	9
Birch Shipping Corp. v. Embassy of United Republic of Tanzania, 507 F.Supp. 311 (D.D.C. 1980)	4
Carey v. National Oil, 453 F. Supp. 1097 (S.D. N.Y. 1978), *aff'd* 592 F.2d 673	6
City of Englewood v. Socialist People's Libyan Arab Jamahirija, 773 F. 2d 31 (3d Cir. 1985)	7
Heaney v. Government of Spain, 445 F.2d 501 (2d Cir. 1971)	6
Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978)	4
John R. v. Oakland Unified School District, 194 Cal. App. 3d 1545 (1987)	10
Libyan American Oil Co. (LIAMCO) v. Socialist People's Libyan Arab Jamahiriya, 482 F.Supp. 1175 (D.C.D.C. 1980)	4
MacArthur Area Citizens Association v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1986), *amended on other grounds*, 823 F.2d 606 (D.C. Cir. 1987)	7
Maritime International Nominees Establishment (MINE) v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982)	4
Marlowe v. Argentine Naval Commission, 604 F.Supp. 703 (D.C.D.C. 1985)	4
Milla v. Tamayo, 187 Cal. App. 3d 1453	9
Ohntrup v. Firearms Center, Inc., 516 F.Supp. 1281 (E.D.Pa. 1981)	4
Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676 (1986)	8, 9
Resource Dynamics International v. General People's Committee, 593 F.Supp. 572 (N.D.Ga. 1984)	4

TABLE OF AUTHORITIES CITED

CASES

Page

Rodgers v. Kemper Construction Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (1975) 8, 10

Skeen v. Federative Republic of Brazil, 566 F.Supp. 1414 (D.D.C. 1984) 10

United States v. County of Arlington, 669 F. 2d 925 (4th Cir. 1983) *cert. denied*, 459 U.S. 801 7

Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grnds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983) 4

Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 6

White v. County of Orange, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985) 10

Statutes

Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1330, 1602-1611) 2

28 U.S.C.:

§ 1605(a) 2

§ 1605(a)(1) 3

§ 1605(a)(2) 6, 7

§ 1605(a)(5) 7, 8, 10

Other Authorities

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. Code Cong. & Admin. News 6604 4

"Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States", Kahale, G. and Vega, M.A., 18 Columbia J. Transnational L. 211, 232 (1979) 5

21 U.S.T. 77, T.I.A.S. No. 6820, April 24, 1963 8

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CONSULATE GENERAL OF NIGERIA and
FEDERAL REPUBLIC OF NIGERIA,
Petitioners,

VS.

CATHERINE JOSEPH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Consulate General of Nigeria and the Federal Republic of Nigeria, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on October 19, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 830 F.2d 1018, and is reprinted in Appendix A.

The memorandum opinion and order of the United States District Court for the Northern District of California has not been reported. It is printed in Appendix B.

JURISDICTION

The opinion of the Court of Appeals was entered October 19, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611.

The relevant portions of section 1605(a) are as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication . . .;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .;
>
> . . .
>
> (4) in which . . . rights in immovable property situated in the United States are in issue; or
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . . .

STATEMENT OF THE CASE

Petitioners adopt the facts as stated in the background section to the Ninth Circuit's opinion, printed in Appendix A, as statement of the case.

REASONS FOR GRANTING THE WRIT

I

CONFLICTS AMONG DISTRICT AND CIRCUIT COURTS REGARDING FINDINGS OF IMPLIED WAIVER OF FOREIGN SOVEREIGN IMMUNITY DEMAND A JUDICIAL CONSTRUCTION OF 28 U.S.C. 1605(a)(1)

In this case, the Ninth Circuit Court of Appeals found an implied waiver of foreign sovereign immunity based on the following language in a standardized lease agreement:

> In the event that any action shall be commenced by either party hereto arising out of, or concerning this lease or any right or obligation derived therefrom, then in addition to all other relief at law or equity, the prevailing party shall be entitled to recover attorney's fees as fixed by the court.

The district and circuit courts which have considered the issue of implied waiver in the sovereign immunity context exhibit such inconsistency in their holdings that resolution is required by this Court.

In the instant case, the Ninth Circuit declined to base its holding that the Federal Republic of Nigeria does not enjoy foreign sovereign immunity from suit on the waiver exception, 28 U.S.C. 1605(a)(1). The court's hesitation to rely on an implied waiver theory was expressly based on a delineation of the conflict between federal courts on the components of an implied waiver.

The FSIA provides little guidance to the courts on the implied waiver excepiion to sovereign immunity. The analysis of the FSIA contained in the House Report is similarly inconclusive when applied to the instant case:

> An implied waiver of immunity will be found when a sovereign agrees to arbitrate in another country, agrees that

> the law of another country will govern the contract, of files a responsive pleading in an action without raising the defense of sovereign immunity.
> H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. Code Cong. & Admin. News 6604.

The precise factual situation presented by the instant case is not provided for in the House Report analysis, since Nigeria did not agree to arbitration, did not agree that the laws of a particular country would govern the contract, nor did Nigeria file pleadings without raising the defense of sovereign immunity.

As regards cases in which foreign sovereigns explicitly agreed to submit to arbitration proceedings, the courts found an implied waiver in *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F.Supp. 311 (D.D.C. 1980); *Ipitrade International, S.A. v. Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C. 1978); and *Libyan American Oil Co. (LIAMCO) v. Socialist People's Libyan Arab Jamahiriya*, 482 F.Supp. 1175 (D.C.D.C. 1980).

However, in similar factual settings, the courts declined to find an implied waiver in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982); *Ohntrup v. Firearms Center, Inc.*, 516 F.Supp. 1281 (E.D.Pa. 1981); *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284 (S.D.N.Y. 1980), aff'd on other grnds, 647 F.2d 320 (2d Cir. 1981), rev'd, 461 U.S. 480 (1983).

Apart from the obvious conflicts in these cases, none of them are instructive here since Nigeria did not sign any agreement to submit to arbitration.

Cases which address contract agreements are more particularly apposite to the instant case. In the context of commercial contracts which specifically provide that disputes will be governed by the law of a particular state in the United States, waiver was found in *Marlowe v. Argentine Naval Commission*, 604 F.Supp. 703, 704, 708-709 (D.C.D.C. 1985); *Resource Dynamics International v. General People's Committee*, 593 F.Supp. 572, 575 (N.D.Ga. 1984).

The Ninth Circuit's holding that "there appears to be no justification for requiring a contract to specifically state the governing law in order for there to be a waiver of immunity" is in conflict with existing law, where waiver has been found in a contract dispute resolution *only where a specific situs* is agreed to by the sovereign state. See, e.g., *Marlowe* and *Resource Dynamics, supra.* Other situations where waiver has been found have been confined to submission to arbitration and the enforcement of arbitral awards. Those cases are distinguishable from contract dispute resolution on the merits.

Certiorari is requested to settle important issues of statutory construction. The Ninth Circuit was uncertain under the circumstances of this case whether actual knowledge and intent is necessary for application of the waiver exception. Further, the FSIA is silent on the question of the authority of the person or body waiving immunity before United States courts. The constitutions or immunity statutes of other nations may forbid any waiver of sovereign immunity by certain officials or completely. Where such a construction of foreign law is clear at the time of the claimed waiver, such waiver would be an ultra vires act and invalid. "Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States", Kahale, G. and Vega, M.A., 18 Columbia J. Transnational L. 211, 232 (1979).

The House Report on the FSIA specifies that since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities, H.R.Rep.note 40, at 18. That observation does not completely resolve the issue of who may waive immunity.

In this case, the signer of the lease agreement had no authority to waive Nigeria's sovereign immunity. However, no consideration was given in the Ninth Circuit's opinion either to the issue of the authority of that person to waive immunity or to the provisions of Nigerian law which may confer that authority on higher officials of government.

Because the FSIA neglects to address these issues, judicial construction by this Court is necessary.

II

THIS CASE PRESENTS A SIGNIFICANT ISSUE OF STATUTORY INTERPRETATION AND APPLICATION INVOLVING FEDERAL JURISDICTION OVER FOREIGN SOVEREIGNS UNDER THE COMMERCIAL ACTIVITIES EXCEPTION

This is the most recent in a series of cases involving actions against foreign sovereigns which have acquired residential property for various diplomatic and consular purposes. Here the Ninth Circuit has held that various non-commercial acts by Nigerian officials while using a consular residence subject Nigeria to federal jurisdiction under 28 U.S.C. 1605(a)(2), commonly known as the commercial activities exception to the FSIA, because the activities were a breach of the lease.

The doctrine of sovereign immunity has traditionally protected foreign sovereigns from the jurisdiction of federal courts in cases based on "acts concerning diplomatic activity." *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934. Acts concerning diplomatic activity was intended in the broad sense of the word and was not meant to be limited to the activities of a diplomatic mission. *Heaney v. Government of Spain*, 445 F.2d 501, 503 (2d Cir. 1971).

Since 1976 federal court jurisdiction over sovereign nations has been limited to grounds set forth in the FSIA. At 28 U.S.C. 1605(a)(2) the FSIA provides that a foreign state shall not be immune from jurisdiction in any case "in which the action is based upon a commercial activity carried on in the United States." The non-commercial activities of a foreign state will be treated with the same deference to which they were entitled before the FSIA took effect. *Carey v. National Oil*, 453 F. Supp. 1097 (S.D. N.Y. 1978), aff'd 592 F.2d 673.

In *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1986), amended on other grounds, 823 F.2d 606 (D.C. Cir. 1987) the District of Columbia Circuit held that by operating a chancery in a residential neighborhood Peru was not engaged in commercial activity. Peru had made extensive modifications on the property for security reasons.

United States v. County of Arlington, 669 F. 2d 925 (4th Cir. 1983) cert. denied, 459 U.S. 801 involved property used by the German Democratic Republic to house personnel and their families attached to its Embassy. The court distinguished between the *acquisition* of the property, which was considered a commercial activity, and the *use* of the property, which was non-commercial. This view was followed in *City of Englewood v. Socialist People's Libyan Arab Jamahirija*, 773 F. 2d 31, 36 (3d Cir. 1985) where the court held that the acquisition of property in a particular commercial transaction does not indelibly stamp the property as being used for commercial activity. *Englewood* involved the part-time residence of the head of the Libyan mission to the United Nations.

There is no dispute that the use of the property by Nigeria was non-commercial. The property was used as a residence for consular officers and their families. This non-commercial use should not provide a basis for jurisdiction under section 1605(a)(2). Yet the Ninth Circuit found that the allegations of non-commercial torts committed by Nigerian officials while using the residence established jurisdiction under the commercial activities exception because they constituted a breach of the residential lease agreement.

In this case the problem is particularly obvious in that the court found that the same torts provided a basis for jurisdiction under both the commercial activities exception and the non-commercial tort exception. When read together, section 1605(a)(2) and 1605(a)(5) provide mutually exclusive bases of jurisdiction. The Ninth Circuit was therefore in error in finding jurisdiction based on both the commercial activities and non-commercial torts exception of the FSIA.

This issue is one which potentially affects every foreign sovereign with consulates and foreign missions in the United States. Review by this Court is necessary to provide guidelines by which the foreign sovereigns and their officers can know when their noncommercial activities will subject the sovereign to the jurisdiction of the federal courts through the commercial activities exception.

III

THE NINTH CIRCUIT'S BROAD INTERPRETATION OF THE NONCOMMERCIAL TORT EXCEPTION TO SOVEREIGN IMMUNITY EXTENDS CALIFORNIA'S TORT LAW BEYOND ITS OWN BROAD PARAMETERS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The complaint in this case alleges that the intentional torts of conversion, waste, and trespass to property were committed by officers and employees of the Consulate General of Nigeria while residing in respondent's house. The Ninth Circuit has confirmed the District Court's ruling that this case falls within the noncommercial activity exception to sovereign immunity, 28 U.S.C. § 1605(a)(5). At the same time, the court has ruled that no public interest or function of the Federal Republic of Nigeria or its Consulate was furthered by the alleged tortious acts, but that consular employees who committed the alleged torts acted within the scope of their employment and do not have consular immunity under the Vienna Convention on Consular Relations. (21 U.S.T. 77, T.I.A.S. No. 6820, April 24, 1963).

Respondent does not contend that the sovereign nation of Nigeria either directed or condoned the extensive damage of her property. Instead, she contends that Nigeria should *reasonably have been expected to have foreseen* the destruction of her property. It is from the Ninth Circuit's concurrence with this claim that Nigeria petitions for review.

The Ninth Circuit's expansive view of foreseeability is derived from its reading of *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676 (1986), a recent California case which quotes an earlier California case, *Rodgers v. Kemper Construction Co.*, 50 Cal. App. 3d 608, 124 Cal. Rptr.

143, 149 (1975). The later case dealt with job related fights, one of the narrow exceptions to the general rule that employers are not liable for intentional torts which employees commit on their own intiative and for their own purposes. The Ninth Circuit reads the following passage from these cases in a peculiarly subjective light. The passage reads:

> "Foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not *so unusual or startling* that it would seem unfair to include the resulting loss from among the other costs of the employer's business. *Perez v. Van Groningen & Sons*, supra at p. 968, quoting *Rodgers v. Kemper Construction Company*, supra at p. 619. (emphasis added)

The court's interpretation puts undue emphasis on the words "startling" and "unusual". Unless an act startles or shocks the finder of fact, it is deemed foreseeable, while under California law "foreseeable" is always qualified, whether implicitly or explicitly by the adverb "reasonably".

A California case which followed *Perez v. Van Groningen & Sons, Inc., supra*, implicitly discredits the Ninth Circuit reading of that case. In *Milla v. Tamayo*, 187 Cal. App. 3d 1453, a minor who had been molested by several Roman Catholic priests sued their employer the Archbishop of Los Angeles under the theory of repsondeat superior. At page 1461, the court found in a unanimous decision that

> It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church. There is simply no basis for imputing liability for the alleged conduct of the individual defendant-priests in this instance to the Respondent Archbishop.

An earlier California case further discredits the expansive interpretation which the Ninth Circuit attaches to the concept of foreseeability. In *Alma W. v. Oakland Unified School District*, 123 Cal. App. 3d 133, 179 Cal. Rptr. 287, the school district was absolved of responsibility for a school janitor's sexual assault on a

minor. The janitor's acts may have been "broadly foreseeable", the court concedes, but they could hardly be considered characteristic of the school district's enterprise. This line of reasoning when applied to the instant case absolves Nigeria from liability for the theft and destruction alleged to have been unleased by its employees.

Nigeria unequivocally accepts the fact that there are exceptions to the general rule that employers are not responsible for intentional torts which employees commit at their own initiative. The principal exceptions under California law are work related fights, *Rodgers v. Kemper Construction Co.*, 50 C.A. 3d 608, 124 Cal. Rptr. 143 (1975) and assaults committed under the yoke of civil authority as in *White v. County of Orange*, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985), where an on duty deputy sheriff raped a woman and *John R. v. Oakland Unified School District*, 194 Cal. App. 3d 1545 (1987), where a teacher molested a student.

However, Nigeria just as unequivocally asserts that the facts of this case do not fall within any of the narrow exceptions to the general rule that employers are not responsible for intentional torts which employees commit at their own behest and for their own benefit.

Further, the court's decision conflicts with the application of the doctrine of respondeat superior applied in other circuits. See *Skeen v. Federative Republic of Brazil*, 566 F.Supp. 1414, 1417-18 (D.D.C. 1984)

The Ninth Circuit, by expanding the notion of respondeat superior in the sovereign immunity context beyond the parameters of California law, has exposed foreign sovereigns to liability far beyond that contemplated by FSIA § 1605(a)(5). This Court's review is required.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

CAROL JOHNSON RODUIT
214 Duboce Avenue
San Francisco, California 94103
(415) 626-0979
Counsel for Petitioners

January 5, 1988

(Appendices follow)

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CATHERINE JOSEPH, *Plaintiff/Appellee/ Cross-Appellant,* v. OFFICE OF THE CONSULATE GENERAL OF NIGERIA, CONSULATE GENERAL OF NIGERIA, FEDERAL REPUBLIC OF NIGERIA, et al., *Defendants/Appellants/ Cross-Appellees.*	Nos. 86-2630; 86-2707 D.C. No. CV-84-6134-WHO OPINION

Argued and Submitted
June 10, 1987—San Francisco, California

Filed October 19, 1987

Before: Herbert Y. C. Choy, Senior Circuit Judge, Thomas Tang and Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Choy

Appeal from the United States District Court for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

SUMMARY

Sovereign Immunity/Landlord and Tenant/Jurisdiction

Appeal from judgment. Affirmed in part, reversed in part and remanded.

Appellee Joseph leased a house to the Consulate General of Nigeria (Consulate). At the lease's end, Joseph discovered that the tenants had severely damaged the premises. Joseph brought suit in district court. Appellants did not respond and a default judgment was entered. Appellants moved to set aside the judgment contending it was void for lack of jurisdiction on account of sovereign and consular immunity. Without deciding the immunity question, the district court granted the motion. A hearing on the sovereign immunity question was then held. Jurisdiction over appellant Federal Republic of Nigeria (Nigeria) and the Consulate pursuant to the Foreign Sovereign Immunities Act (FSIA) was found. The district court found jurisdiction only pursuant to the tortious activity exception to immunity. This decision immunized Nigeria and the Consulate from Joseph's breach of contract claims. Jurisdiction over tenant-consular employee Olalandu was found. He was not protected by consular immunity under the Vienna Convention. In light of these findings, Joseph requested reinstatement of the default judgment. It was denied. Both parties bring interlocutory appeals.

[1] Under the FSIA, actions taken by foreign states or their instrumentalities are sovereign acts and thus are protected from the exercise of jurisdiction, unless an FSIA exception of immunity applies. [2] The waiver exception denies immunity in any case in which the foreign state has waived its immunity either explicitly or by implication. [3] Where an agreement contemplates adjudication of a dispute by the United States courts, the waiver exception should be applied. [4] Because the lease at issue provides for adjudication of landlord-tenant disputes in court, the lease contemplates participation of the United States courts in disputes between Joseph and her tenants. Therefore, the waiver exception is applicable to Joseph's breach of contract and tort claims. [5] The commercial activity exception denies immunity in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state. [6] There is no indication that Congress intended the presence of a profit motive on the part of

the sovereign to be a threshold requirement for applying the commercial activity exception. [7] Although the lease agreement at issue was not undertaken by the Consulate for profit, it nevertheless was a commercial transaction. Therefore, Joseph's breach of contract claim against Nigeria may be heard. [8] To find that a foreign sovereign can be sued under the tortious activity exception, the court must find two requirements. [9] The "scope of employment" provision requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals. This determination is governed by state law. [10] The individual tortious acts alleged by Joseph were within the scope of employment of the residents of the Joseph house. [11] The torts alleged by Joseph must not involve the exercise of discretionary functions. The existence of a discretionary function is analyzed pursuant to the Federal Tort Claims Act's (FTCA) discretionary function exception principles. [12] All of the requirements of the tortious activity exception are met and the district court has jurisdiction over Joseph's tort claims against Nigeria and the Consulate. [13] Consular officials are subject to the jurisdiction of the receiving state except in respect of acts performed in the exercise of consular functions. [14] The district court correctly found that no public interest or function of the Consulate or Nigeria was furthered by the allegedly tortious acts performed by Olalandu. Therefore, the district court has jurisdiction over Joseph's tort claims against Olalandu. [15] A district court's grant of a motion to set aside a default judgment is not an appealable final order. [16] Joseph's request for attorney's fees is denied.

COUNSEL

John H. Aspelin, San Francisco, California, for the plaintiff-appellee/cross-appellant.

Carol Johnson Roduit, San Francisco, California, for the defendants/appellants/cross-appellees.

OPINION

CHOY, Senior Circuit Judge:

This appeal primarily requires us to decide whether the district court has subject matter jurisdiction over a landlord-tenant dispute between a landlord and a foreign state, its consulate, and its consular officials. We conclude that the district court has jurisdiction over the landlord's breach of contract and tort claims. The district court's order finding jurisdiction over only the tort claims is affirmed in part and reversed in part.

BACKGROUND

The sovereign defendants in this case are the Federal Republic of Nigeria ("Nigeria") and the Consulate General of Nigeria (the "Consulate"). According to the defendants, the basic function of the Consulate is to protect the interests of Nigerians residing in its consular district, and to encourage cultural exchanges between Nigerian and American organizations.

In 1978, Catherine Joseph ("Joseph") leased a house in San Francisco to the Consulate. O. Effiong, a former consular officer, signed the standard form lease on behalf of the Consulate. The house was used as a residence by employees of the Consulate and their families. One of those consular employees was defendant A.A. Olalandu ("Olalandu"), a finance officer for the Consulate, who began residence at the Joseph property in 1982.

Shortly after the end of the five-year lease period, Joseph allegedly discovered that the tenants had removed property from the house and had left the premises severely damaged. Joseph brought suit in federal district court, seeking, inter alia, compensation for damages to fixtures, landscaping, and

appliances.[1] Joseph asserts four causes of action against both Nigeria and the Consulate. The first is for breach of contract; the other three are tort claims for conversion, trespass, and waste.[2] In addition, Joseph asserts three tort claims against Olalandu for conversion, trespass, and waste.

Joseph filed her complaint in district court in August 1984. The defendants did not respond. On September 27, 1985, the court entered a default judgment against the defendants. In January 1986, the defendants filed a motion to set aside the default judgment. The defendants contended that the default judgment was void for lack of jurisdiction on account of the defendants' sovereign and consular immunity. On March 19, 1986, without deciding the immunity question, the district court granted the defendants' motion on two conditions: 1) that the defendants raise their claims of sovereign and consular immunity in the form of a motion for summary judgment; and 2) that the defendants pay Joseph's attorney's fees. After the parties submitted motions for summary judgment, the court held a hearing on the sovereign immunity question.

On August 12, 1986, the court issued an opinion and order. The court determined that it had jurisdiction over Nigeria and the Consulate pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (1982). Specifically, the court found jurisdiction over Joseph's tort claims under the FSIA's "tortious activity" exception to

---

[1]The defendants' brief states that Joseph alleges "extensive damage to appliances, fixtures, and landscaping; removal of appliances, furniture, light fixtures, solid wood doors, the glass shower door; removal of shutters and drapes from thirty-three windows, removal of fully grown trees; the removal of wood framing from windows and floor boards, the removal of a built-in barbecue."

[2]Joseph's cause of action against the Consulate for breach of contract is premised on the argument that the Consulate acted outside the scope of its consular authority in leasing the Joseph house. However, the district court's opinion indicates that Joseph has conceded that the Consulate is not subject to the breach of contract claim.

immunity. However, the court concluded that jurisdiction over Nigeria and the Consulate was not conferred by the FSIA's "waiver," "commercial activity," and "immovable property," exceptions. Because the district court found jurisdiction only pursuant to the tortious activity exception, the court's decision immunized Nigeria and the Consulate from Joseph's breach of contract claims.

The court found jurisdiction over Olalandu pursuant to 28 U.S.C. § 1351 (1982). The court determined that Olalandu was not protected by consular immunity under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (the "Vienna Convention"), which provides immunity to consular officials for actions which are performed in the exercise of the officials' consular functions.

In light of the district court's finding of jurisdiction, Joseph requested to have the default judgment reinstated. The request was denied by the district court "because no trial on the merits was ever held." The court then set a trial date for Joseph's claims.

Both Joseph and the defendants have brought interlocutory appeals in regard to the district court's decision.[3] The defendants appeal the district court's determination that it had jurisdiction over Joseph's tort claims against Nigeria and the Consulate pursuant to the tortious activity exception. Olalandu apparently appeals the district court's determination that he is not protected by consular immunity.[4]

---

[3]We hear the defendants' appeal, although interlocutory, pursuant to this court's order of March 6, 1987, denying Joseph's motion to dismiss the appeal for lack of jurisdiction.

[4]Olalandu's alleged consular immunity is not discussed in the defendants' brief. However, the notice of appeal filed by the defendants on September 9, 1986, lists Olalandu as one of the parties appealing the district court's decision. In order to effect a complete review of the district court's decision, we will address the issue of Olalandu's immunity.

Joseph contends on appeal that the district court erred in failing to reinstate the default judgment once immunity was denied. Joseph also argues that the district court incorrectly determined that jurisdiction over Nigeria and the Consulate is not conferred by the waiver, commercial activity, and immovable property exceptions to the FSIA.

DISCUSSION

Our evaluation of the defendants' claims of immunity involves two independent doctrines. The doctrine of sovereign immunity is applicable only to states and their instrumentalities—here, Nigeria and the Consulate. The doctrine of consular immunity is applicable only to consular officials and employees—here, Olalandu.

I. *Sovereign Immunity*

The FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states or their instrumentalities. *De Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see* 28 U.S.C. § 1330(a). Nigeria is of course a foreign state. The Consulate, as a separate legal person, also qualifies as a "foreign state" under the FSIA. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1517 (9th Cir. 1987).

[1] Under the FSIA, we presume that actions taken by foreign states or their instrumentalities are sovereign acts and thus are protected from the exercise of our jurisdiction, unless one of the FSIA's exceptions to immunity applies. *Meadows v. Dominican Republic*, 817 F.2d 517, 522 (9th Cir. 1987). Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. *See id.* at 522-23; *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 199 (5th Cir. 1984).

Joseph claims that Nigeria and the Consulate are subject to jurisdiction pursuant to four exceptions to sovereign immunity set forth in § 1605 of the FSIA. These exceptions are commonly known as the waiver exception, 28 U.S.C. § 1605(a)(1), the commercial activity exception, 28 U.S.C. § 1605(a)(2), the immovable property exception, 28 U.S.C. § 1605(a)(4), and the tortious activity exception, 28 U.S.C. § 1605(a)(5).[5] We review de novo the district court's determination that subject matter jurisdiction over Joseph's lawsuit is conferred *only* by the tortious activity exception. *See Gerritsen*, 819 F.2d at 1515. We conclude that: 1) the waiver exception is applicable to all of Joseph's claims; 2) the commercial activity exception is applicable to Joseph's breach of contract claims; and 3) the tortious activity exception is applicable to Joseph's tort claims.

---

[5]The relevant portions of section 1605(a) are as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication . . .;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .;
>
> . . .
>
> (4) in which . . . rights in immovable property situated in the United States are in issue; or
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . . .

A. *Waiver Exception*

[2] The FSIA's waiver exception denies immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication . . . ." 28 U.S.C. § 1605(a)(1). The waiver exception is narrowly construed. *See Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985). Implicit waivers are ordinarily found only where: "(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity." *Id.*

At issue in this case is whether the lease agreement between Joseph and the Consulate implicitly waives sovereign immunity. The relevant lease provision states:

> In the event that any action shall be commenced by either party hereto arising out of, or concerning this lease or any right or obligation derived therefrom, then in addition to all other relief at law or equity, the prevailing party shall be entitled to recover attorney's fees as fixed by the court.

We conclude that this provision constitutes a waiver of sovereign immunity as to all of Joseph's claims against Nigeria and the Consulate.

A foreign state does not waive its sovereign immunity merely by entering into a contract with another party. Nevertheless, at the very least it is clear that a sovereign party has waived immunity where a contract *specifically* states that the laws of a jurisdiction within the United States are to govern the transaction. *Marlowe v. Argentine Naval Commission*, 604 F. Supp. 703, 708-09 (D.D.C. 1985) (implicit waiver where contract stated that it "shall be governed by and construed in accordance with the laws of the District of

Columbia"): *Resource Dynamics International, Ltd. v. General People's Committee for Communications and Maritime Transport in the Socialist People's Libyan Arab Jamahiriya*, 593 F. Supp. 572, 575 (N.D. Ga. 1984) (implicit waiver where contract provided that "[t]his Agreement and the performance or breach hereof shall be governed by the . . . laws in effect in the State of Virginia"). On the other hand, where a contract specifies that the laws of a jurisdiction outside of the United States are to govern, a waiver of sovereign immunity has not been made for the purposes of the FSIA. *See Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F. Supp. 1457, 1461-62 (S.D.N.Y. 1986).

[3] In the instant case, the lease agreement does not specify which jurisdiction's laws will govern disputes under the lease. Joseph argues that it is not necessary for a contract to specify which law will govern a contract in order for the waiver exception to apply. Indeed, there appears to be no justification for requiring a contract to specifically state the governing law in order for there to be a waiver of immunity. Waiver by contract is premised on an agreement by the parties that the United States courts may become involved in disputes arising pursuant to the contract. *Cf. Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1103 (D.C. Cir. 1983) (arbitration agreement case), *cert. denied*, 464 U.S. 815 (1983). Where an agreement contemplates adjudication of a dispute by the United States courts, the waiver exception should be applied, regardless of whether the governing law is explicitly identified. *See id.* at 1103-04; *see also Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73, 76 (S.D.N.Y. 1986).

[4] Because the lease at issue provides for adjudication of landlord-tenant disputes in court, we conclude that the lease contemplates participation of the United States courts in disputes between Joseph and her tenants. In light of the wholly local nature of the transaction, it is virtually inconceivable that the Consulate contemplated that adjudication of dis-

putes would occur in a court outside of the United States. Therefore, we believe that the waiver exception is applicable to Joseph's breach of contract and tort claims. Nevertheless, because of the vagueness of the waiver provision at issue, and because the waiver exception should be narrowly construed, we deem it advisable to refer to other FSIA exceptions to immunity to support our finding of jurisdiction.[6]

B. *The Commercial Activity Exception*

[5] The commercial activity exception denies immunity in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). In determining whether the commercial activity exception applies, the courts focus only on those *specific* acts that form the basis of the suit. *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985). That is, the courts examine "whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character." *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980). Our discussion of the commercial activity exception will focus on Joseph's breach of contract claim. Thus, we must determine whether the lease agreement, and the alleged breach of that agreement, constituted commercial activities.

---

[6]In particular, we are uncertain whether the Consulate *knowingly and intentionally* agreed to waive sovereign immunity, or whether under the circumstances in this case such actual knowledge and intent is necessary for the application of the waiver exception. *Compare Marlowe*, 604 F. Supp. at 709 (FSIA does not require "express and unambiguous consent" to jurisdiction) *with Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (waiver of immunity must be "intentional and knowing"). Although we believe that the lease provision at issue was sufficient to effect an implicit waiver of immunity, we are reluctant to rest our holding—that the district court has jurisdiction over Joseph's basic claims—solely on the waiver exception.

The FSIA, somewhat tautologically, defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The FSIA directs the courts to evaluate the *nature* rather than the *purpose* of the activity in question. *Id.* Thus, a contract to purchase military supplies, although clearly undertaken for public use, is commercial in nature and therefore subject to the commercial activity exception. *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir.), *cert. denied*, 106 S. Ct. 347 (1985). Nevertheless, the purpose of an act may be *relevant* in defining its nature: "[o]ften, the essence of an act is defined by its purpose." *De Sanchez*, 770 F.2d at 1393.

In the instant case, the district court stated that "[c]ommercial activity is defined as the type of act an individual would customarily carry on for profit." The district court concluded that the commercial activity exception did not apply because the Consulate did not contract to be a lessee of the Joseph residential property for profit.

[6] This reasoning is flawed. Some courts have indeed indicated that the commercial activity exception will ordinarily be applied where a sovereign engages in a transaction for profit. *See, e.g. De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (in determining whether an activity is commercial, "[t]he court must inquire whether the activity is of the type an individual would customarily carry on for profit"), *cert. denied*, 471 U.S. 1125 (1985); *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1357 (9th Cir. 1981) ("[u]nder the FSIA a commercial activity is one which an individual might 'customarily carr[y] on for profit' " (quoting H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615)), *cert. denied*, 454 U.S. 1163 (1982). However, there is no indication that Congress intended the presence of a profit motive on the part of the sovereign to be a *threshold*

requirement for applying the commercial activity exception. In this regard the Legislative History merely states that "[c]ertainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615. Moreover, the use of profit motive as a threshold requirement for applying the commercial activity exception would be inconsistent with the FSIA's focus on the nature of the transaction at issue rather than its purpose. *See De Sanchez,* 770 F.2d at 1393.

In addition, a transaction need not be made in connection with a business or commercial enterprise operated *by the sovereign* in order to be "commercial" for the purposes of the FSIA. Transactions between strictly governmental entities and commercial enterprises are covered by the commercial activity exception if the role of the sovereign is one which might be played by a private actor. *See Meadows,* 817 F.2d at 523. An activity is public and "noncommercial" if it is one which only a sovereign state can perform. *Id.*; *MOL, Inc. v. Peoples Republic of Bangladesh,* 736 F.2d 1326, 1329 (9th Cir.) (suit against Bangladesh over termination of licensing agreement for the export of monkeys was not allowable under commercial activity exception), *cert. denied,* 469 U.S. 1037 (1984). Although a contract to purchase goods or services may be presumptively commercial, a contractual activity should not be designated as "commercial" without first examining whether the activity is of a kind in which a private party might engage. *See Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543, 1549 (D.C. Cir. 1987).

[7] Applying the principles articulated above, we conclude that, although the lease agreement at issue was not undertaken by the Consulate for profit, it nevertheless was a commercial transaction. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615 (government's leasing of property is commercial; contracts to construct a government building and to

make repairs on an embassy building are commercial). In renting the Joseph property, the Consulate entered the marketplace as a commercial actor. *Compare De Sanchez*, 770 F.2d at 1394. There is nothing about the lease agreement, or the alleged breach of that agreement, which distinguishes the transaction from an ordinary private commercial transaction, aside from the fact that the Consulate General of Nigeria was the tenant. Neither the Consulate's rental agreement, nor its alleged breach of that agreement, constitute sovereign activities. Therefore, contrary to the district court's decision, Joseph's *breach of contract* claim against Nigeria may be heard pursuant to the commercial activity exception. *See id.* at 1394 & n.11.

C. *Tortious Activity Exception*

We find it unnecessary to determine the applicability of the commercial activity exception to Joseph's *tort* claims, in light of our determination that the district court correctly concluded that the FSIA's tortious activity exception applies to these claims.

[8] The tortious activity exception provides jurisdiction over tort actions not encompassed in the commercial activity exception "in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. § 1605(a)(5). In order to find that a foreign sovereign can be sued under the tortious activity exception, the court must find: (1) that the tortious acts of individual employees of the sovereign were undertaken within the scope of employment, and (2) that the claim is not based upon the exercise or failure to exercise a discretionary function. *Id.* Both requirements are met in the instant case.[7]

---

[7]We reject Joseph's apparent contention that Nigeria can be held liable for waste without regard to the intricacies of the tortious activity exception. *Cf. Merritt v. United States*, 332 F.2d 397, 399 (1st Cir. 1964) (plaintiff cannot escape Federal Tort Claims Act requirements by pleading waste).

1. *Scope of Employment*

[9] The "scope of employment" provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals. *See Skeen v. Federative Republic of Brazil,* 566 F. Supp. 1414, 1417-18 (D.D.C. 1983). This determination is governed by state law. *Id.* at 1417. In this case, the law of California applies.

Under California respondeat superior doctrine, the determination of whether an employee has committed a tort during the course of employment turns on whether: (1) the act performed was either required or incident to his or her duties, *or* 2) the employee's misconduct could be reasonably foreseen by the employer. *Clark Equipment Co. v. Wheat,* 92 Cal. App. 3d 503, 154 Cal. Rptr. 874, 882 (1979). Joseph contends that the second "foreseeability" approach is applicable here. We agree.

Throughout this case the defendants have conceded that the Joseph property was occupied as a residence by an authorized consular officer for the purpose of performing consular responsibilities. That is, the defendants have defined the scope of employment to include residence at the Joseph house.

The defendants contest the application of respondeat superior primarily on the ground that the alleged tortious acts at the Joseph house were not foreseeable. We reject this argument. "Foreseeability" as a test for *respondeat superior* merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business. *Rodgers v. Kemper Construction Co.,* 50 Cal.App. 3d 608, 619, 124 Cal. Rptr. 143, 149 (1975). Under this definition, the acts in question

were foreseeable. There is nothing unusual or startling about damage done to a house in the course of its occupation.

The defendants also object to the application of respondeat superior to this case because the acts at issue did not benefit Nigeria, and were intentional. However, respondeat superior is applicable to acts that are contrary to the employer's orders, and that are not for the benefit of the employer. *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal. Rptr. 106, 109-10, 719 P.2d 676 (1986).[8] In addition, the acts at issue may involve a combination of the employee's personal business with the employer's business. *Perez*, 227 Cal. Rptr. at 110. These principles are applicable even in cases of intentional torts. *See Perez*, 227 Cal. Rptr. at 109-10.

[10] In light of California's expansive approach to respondeat superior, we conclude that the individual tortious acts alleged by Joseph were within the scope of employment of the residents of the Joseph house. The damage allegedly caused by the consular employees was a risk inherent in the consular enterprise, under the defendants' broad definition of that enterprise. The defendants cannot avoid responsibility for damage done by its employees in the Joseph house. *See Perez*, 227 Cal. Rptr. at 110.

2. *Discretionary Function*

[11] In order for the tortious activity exception to be applied to this case, the torts alleged by Joseph must not involve the exercise of discretionary functions. *See* 28 U.S.C. § 1605(a)(5)(A). The existence of a discretionary function under the FSIA is generally analyzed under the principles developed pursuant to the Federal Tort Claims Act's ("FTCA") discretionary function exception. *Olsen v. Govern-*

---

[8]Nevertheless, employer authorization and employer benefit are *relevant* to the respondeat superior issue. *See Childers v. Shasta Livestock Auction Yard, Inc.*, 190 Cal. App. 3d 792, 235 Cal. Rptr. 641, 647 (1987).

ment of Mexico, 729 F.2d 641, 646-47 (9th Cir.), *cert. denied,* 469 U.S. 917 (1984). At one time, this circuit distinguished between two types of governmental acts: those at the "planning" level and those at the "operational" level. The former qualified for the discretionary function exception; the latter did not. *See Olsen,* 729 F.2d at 647. This approach was utilized by the district court in finding that the acts in question were not discretionary. However, we have abandoned this approach in FTCA cases, pursuant to the Supreme Court's decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797 (1984). *See, e.g., Mitchell v. United States,* 787 F.2d 466, 468 (9th Cir. 1986) (planning-operational distinction has been abandoned); *Chamberlin v. Isen,* 779 F.2d 522, 524 (9th Cir. 1985) (same); *Begay v. United States,* 768 F.2d 1059, 1062-63 n.2 (9th Cir. 1985) (same).

Pursuant to *Varig,* a two-pronged test has been developed for determining whether the discretionary function exception applies in FTCA cases. First, the court must examine " 'the nature of the conduct, rather than the status of the actor.' " *Begay,* 768 F.2d at 1064 (quoting *Varig,* 467 U.S. at 813). Second, the court must inquire whether the governmental acts at issue were " 'grounded in social, economic, and political policy.' " *Id.* In other words, the court should avoid second-guessing policy decisions through the medium of a tort action. *Id.* The execution of policy decisions by subordinates, even those subordinates at the operational level, comes under the discretionary function exception if the acts involved the exercise of policy judgment. *Red Lake Band of Chippewa Indians v. United States,* 800 F.2d 1187, 1196 (D.C. Cir. 1986).

The application of the *Varig* approach to FSIA cases is ably discussed in *MacArthur Area Citizens Association v. Republic of Peru,* 809 F.2d 918 (D.C. Cir.), *amended on other grounds,* 823 F.2d 606 (D.C. Circ. 1987). The factual situation in *MacArthur* is somewhat similar to the case at issue. Peru pur-

chased a building in an area zoned for residential use, and proceeded to convert the property into a chancery. Primarily for security reasons, Peru put bricks and bars over various parts of the building, established an elaborate alarm system, and installed harsh fluorescent lights. *Id.* at 919. Because of the unsightly nature of the results, a neighborhood association sued for damages. The district court dismissed the suit on the ground of sovereign immunity, and the court of appeals affirmed pursuant to, inter alia, the FSIA's discretionary function exception.

The court stated that "establishing a chancery . . . to conduct foreign relations is a discretionary public policy decision and . . . this decision undergirds the specific acts which the Association bewails." *Id.* at 922. The court found that the decisions to purchase and modify the chancery building were made in order to implement the determination to establish the chancery. The court concluded that these implementing decisions involved a measure of policy judgment and were thereby protected by the discretionary function exception. *Id.* at 922-23. Specifically, the court stated that the implementing decisions at issue: "(1) [were] grounded in an economic judgment regarding which property represents the best value; or (2) embodie[d] a political decision regarding the image that the Peruvian Government seeks to project through the offices it occupies; or (3) reflect[ed] security considerations . . . ." *Id.* at 923. In sum, the actions taken by Peru were intimately connected with policy decisions made by a sovereign, and were therefore discretionary.

MacArthur indicates that the *acquisition and operation* of the Joseph residence by the Consulate was a discretionary policy decision. However, *MacArthur* does not indicate that the purely destructive acts which give rise to Joseph's tort claims were discretionary. Destruction of property can hardly be considered as part of a policy decision to establish a consular residence. Nor will the exercise of jurisdiction over the instant lawsuit encroach on the ability of foreign sovereigns

to make policy decisions regarding their consular buildings. *See Liu v. Republic of China*, 642 F. Supp. 297, 305 n.7 (N.D. Cal. 1986). We therefore conclude that the discretionary function exception does not apply to Joseph's tort claims.

[12] In sum, all of the requirements of the tortious activity exception are met in this case. The district court has jurisdiction over Joseph's tort claims against Nigeria and the Consulate.

D. *Immovable Property Exception*

Because we have already determined that the district court has jurisdiction over Joseph's breach of contract and tort claims against Nigeria and the Consulate, we find it unnecessary to decide whether the FSIA's immovable property exception is applicable to this case.

III. *Consular Immunity*

Jurisdiction by the district court over consular official Olalandu is premised on 28 U.S.C. § 1351, which states that "[t]he district courts shall have original jurisdiction . . . of all civil actions and proceedings against—(1) consuls or vice consuls of foreign states." However, the district court does not have jurisdiction over Olalandu if he is protected by consular immunity. We review de novo the district court's conclusion that it does have subject matter jurisdiction over Joseph's tort claims against Olalandu. *See Gerritsen*, 819 F.2d at 1515.

[13] The consular immunity of Olalandu is governed by the Vienna Convention. *See id* at 1515-16. Under article 43 of the Vienna Convention, consular officials are subject to the jurisdiction of the receiving state except "in respect of acts performed in the exercise of consular functions." 21 U.S.T. at 104. Article 5 of the Vienna Convention defines the term "consular function." Articles 5(a)-5(l) list twelve specific con-

sular functions. Article 5(m), a "catch-all" provision, defines "consular function" to include "any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State." 21 U.S.T. at 82-85.

[14] We conclude that the tortious acts alleged by Joseph were not "performed in the exercise of" Olalandu's consular function as a resident of the Joseph house, or of any of Olalandu's other consular functions. *Cf. Heaney v. Government of Spain*, 445 F.2d 501, 505 (2d Cir. 1971) (because consular representative acted in the exercise of consular function in entering into contract, article 5(m) immunized representative from breach of contract suit). The "exercise" of a consular function necessarily implies an attempt by an employee to perform his or her consular duties successfully. *See Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105, 1108-09 (1983). The district court correctly found that no public interest or function of the Consulate or Nigeria was furthered by the allegedly tortious acts performed by Olalandu. Therefore, the district court has jurisdiction over Joseph's tort claims against Olalandu.[8]

III. *The Default Judgment*

In light of the district court's finding of jurisdiction over Joseph's lawsuit in its opinion of August 12, 1986, Joseph contends that the district court abused its discretion in failing to reinstate the default judgment that was entered in Septem-

---

[8]This determination does not conflict with our conclusion pursuant to the tortious activity exception of the FSIA that Olalandu and the other consular employees residing at the Joseph house acted within the scope of their employment in committing the alleged torts. The terms "*scope* of employment" and "*exercise* of a consular function" are not coterminous. The former, governed by California law, does not require the acts at issue to further an employer's interests. The latter, which is not governed by California law, concerns acts in support of an employee's consular duties.

ber 1985 and set aside on March 19, 1986.[9] Joseph argues that she should be allowed to appeal the March 19 set aside as part of this interlocutory appeal. We disagree.

[15] A district court's *grant* of a motion to set aside a default judgment is not an appealable final order, where the setting-aside paves the way for a trial on the merits. *See Dimmitt & Owens Financial, Inc. v. United States,* 787 F.2d 1186, 1192 (7th Cir. 1986); *Parks v. Collins,* 761 F.2d 1101, 1104 (5th Cir. 1985); *Murphy v. Helena Rubenstein Co.,* 355 F.2d 553, 553 (3d Cir. 1965). *But see Thorpe v. Thorpe,* 364 F.2d 692 (D.C. Cir. 1966). Therefore, in the instant case, the district court's order setting aside the default judgment is not appealable. Our decision to hear an interlocutory appeal regarding the district court's jurisdiction over the defendants provides no basis for reaching Joseph's claim that the district court's order setting aside the default judgment was improper.

CONCLUSION

The district court has jurisdiction under the FSIA over Joseph's breach of contract and tort claims against Nigeria and the Consulate. We REVERSE the district court's determination that Joseph's breach of contract claims cannot be heard pursuant to the waiver or commercial activity exceptions. We AFFIRM the district court's determination that Joseph's tort claims can be heard pursuant to the tortious activity exception. We also conclude that the waiver exception is applicable to Joseph's tort claims.

In addition, the district court is not precluded by the

---

[9]Default judgments are governed by Fed. R. Civ. P. 55. Rule 55(c) states that a district court may set aside a default judgment in accordance with Fed. R. Civ. P. 60(b). Under Rule 60(b)(6), a district court may set aside a judgment for "any . . . reason justifying relief from the operation of the judgment."

Vienna Convention from hearing Joseph's tort claims against Olalandu. The district court's decision to that effect is AFFIRMED.

[16] Joseph's request for attorney's fees on this appeal is denied. Joseph argues that she is entitled to attorney's fees pursuant to the lease provision which states that "the prevailing party [in an action at law or equity] shall be entitled to recover attorney's fees as fixed by the court." At this stage of the proceedings it is premature for us to determine who is the prevailing party as to Joseph's breach of contract and tort claims.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-84-6134 WHO

CATHERINE JOSEPH,
Plaintiff,

vs.

OFFICE OF THE CONSULATE GENERAL OF NIGERIA, CONSULATE GENERAL OF NIGERIA, FEDERAL REPUBLIC OF NIGERIA, A. A. OLALANDU,
Defendants.

MEMORANDUM OPINION AND ORDER

[Filed Aug. 12, 1986]

Plaintiff, Catherine Joseph, is the owner of 1598 34th Avenue in San Francisco. Defendant Federal Republic of Nigeria, through defendants Office of the Consulate General of Nigeria and the Consulate General of Nigeria, leased plaintiff's property pursuant to a written agreement, dated May 31, 1978, for a five-year period. Defendants terminated their tenancy in August 1983. According to the allegations in plaintiff's complaint, the premises were severely damaged, and property was removed by the occupants.

On August 31, 1984, plaintiff filed her complaint in this Court against the above-named defendants, as well as against defendant A. A. Olalandu, alleging breach of contract, trespass, conversion, and waste. Defendants did not answer or otherwise appear, and this Court entered a judgment by default on September 27, 1985.

In January 1986 defendants moved this Court to set aside the default judgment as void on the grounds of sovereign immunity. The Court, without deciding the immunity question, granted defendants' motion on the condition that defendant Republic of Nigeria pay plaintiff's attorney's fees. Defendants then brought a motion for reconsideration of the attorney's fee award on the ground that this Court was without jurisdiction to award fees prior

to a ruling on the question of sovereign immunity. The Court took this motion under advisement and ordered the parties to brief the sovereign immunity question. Cross-motions for summary judgment were filed by the parties and a hearing was held on June 18, 1986, at which time the Court ordered further briefing.

Having read the pleadings and papers filed in this case, and considered the oral arguments, the Court now makes this order.

I.

Plaintiff's first four causes of action, for breach of contract, conversion, trespass, and waste, against the Federal Republic of Nigeria, are premised on jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1441(d) and 1602 *et seq.* Plaintiff alleges generally that each of the defendants, as agents and employees of the other defendants, were acting within the scope of their authority and with the permission and consent of their co-defendants.

Title 28 U.S.C. § 1604, the FSIA, grants blanket immunity to foreign governments, then carves out exceptions in §§ 1605 and 1607. In her motion for summary judgment, plaintiff states four grounds for finding exception to immunity in this case: (1) the noncommercial tort exception, (2) the waiver exception, (3) the immoveable property exception, and (4) the commercial activity exception.

Section 1605(a)(2) excepts from immunity any "action based upon a commercial activity carried on in the United States by the foreign state." In determining the scope of this exception, the key inquiry is into the nature of the conduct of the foreign state. Commercial activity is defined as the type of act an individual would customarily carry on for profit. *See Letelier v. republic of Chile*, 748 F.2d 790 (2d Cir. 1984). Although plaintiff in this case was clearly engaged in the leasing transaction for profit, the focus should be on the conduct of the foreign state. Individuals do not customarily contract to be lessees of residential property for profit, and the Court thus concludes that this exception is not applicable.

The Court similarly declines to rely on the waiver and immoveable property exceptions to sovereign immunity.

Nevertheless, § 1605(a)(5) provides a basis for jurisdiction in this case. That section provides that a foreign state shall not be immune in any case "in which money damages are sought against a foreign state for * * * loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee * * * while acting within the scope of his office or employment" unless a discretionary function of the state is involved.

The second, third, and fourth claims allege torts against the Republic of Nigeria, and the complaint also alleges that the other defendants were acting within the scope of their employment at all relevant times. Under the plain language of this provision then, the Republic of Nigeria would not be immune unless the damage done to plaintiff's house was the result of a discretionary function performed by the Republic. The torts alleged in the complaint were committed by officers and employees of the Consulate and their family members, in property leased by the Consulate and the Republic for their employees, as part of their employment. Under the test set forth in *Olsen v. Government of Mexico*, 729 F.2d 641 (9th Cir. 1984), governments are immune from torts which occur in the exercise of "discretionary governmental functions," while torts arising out of "operational functions" are actionable. Discretionary acts are those occurring at the planning level of government policy. The acts herein alleged are clearly not discretionary and, thus, the non-commercial tort exception is applicable and the Republic of Nigeria is not immune from liability.

II.

Plaintiff's fifth cause of action is against the Consulate General and the Office of the Consulate for breach of contract. Plaintiff's sixth, seventh, and eighth causes of action are against the Consulate General, the Office of the Consulate General, and A. A. Olalandu, a former consular officer, for trespass, conversion, and waste. Jurisdiction for these claims is based on 28 U.S.C. § 1351, which provides for jurisdiction over consuls and vice-consuls.

Immunity of consular officers and employees is governed by Article 43 of the Vienna Convention on Consular Relations of 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (1970) ("Vienna Convention").

The Vienna Convention provides for immunity for consular officers "in respect of acts performed in the exercise of consular functions." Consular functions, as defined in Article 5, do not include the tortious acts alleged in this complaint. Article 5(m) provides for immunity for performance of consular functions "not prohibited by the laws and regulations" of the host state. Of course, this must exclude from immunity the torts plaintiff alleges.

As to defendants' contention that plaintiff's house became a consular premise, Article 1(j) of the Convention limits consular premises to those buildings "used exclusively for the purposes of the consular post." Plaintiff's house was not used as the consular post, but as living quarters.

Plaintiff does concede, however, that the leasing of property may be a consular function under the terms of the Vienna Convention, and thus declares that if defendants also so concede, she will not assert breach of contract claims against the Consulate.

Consular employees do not enjoy sovereign immunity by virtue of the Vienna Convention because the tortious conduct alleged cannot in any manner be viewed as consular functions. No public interest or function of the Consulate or the Republic was furthered by such acts and the consular employees are not immune from liability.

III.

One final point must be addressed. In their reply brief, and at oral argument, defendants, through their attorney, argued that because plaintiff generally alleged (*see* Complaint ¶ 31) that the consular employees entered into the lease "while acting *outside the scope* of their consular functions," the complaint must be dismissed against the Republic and Consulate General, on the

grounds that the noncommercial tort exception to sovereign immunity is explicitly limited to those cases in which the employees were "acting *within the scope*" of their office or employment. (Emphasis added.) Defendants insist that plaintiff has indulged in a fatal inconsistency, and that if the consular officials are not immune due to their acts outside the scope of consular functions, then by necessity the Republic and the Consulate General of Nigeria must be immune under the FSIA. The Court does not agree.

Consular immunity is determined by the definition of consular functions contained in the Vienna Convention. Consular functions create limited immunity for acts committed by individual consular officers while performing the function of the consular post. Scope of employment is essentially a definitional tool for determining the applicability of *respondeat superior,* in this case the noncommercial tort exception of the FSIA, *See Skeen v. Federative Republic of Brazil*, 556 F.Supp. 1414, 1417 (D.D.C. 1983). The two concepts are contained in different statutory provisions and are not coterminous. The scope of employment, for example, may encompass all the acts committed by a consular employee on behalf of his employer, and would include many more acts than those that are expressly defined under the Vienna Convention as "consular functions."

Thus, this Court has found that the Republic and Consulate General of Nigeria are not immune from liability, under the noncommercial tort exception to the FSIA, because Nigeria defined the scope of employment as including residence at a house supplied by and paid for by Nigeria. Similarly, the consular employees, are individually immune under the Vienna Conventions for acts that they committed while residing at that house, because those acts were not within those defined as "consular functions."

IV.

Because the Court has now decided the question of immunity, and has determined that none of the defendants in this case enjoy immunity, it will reinstate its order on attorney's fees. A default

judgment was entered in this case, but it was set aside on March 6, 1986, on the condition that defendants pay plaintiff's attorney's fees. Defendants' motion to reconsider the attorney fee award was taken under advisement pending determination of the immunity question. At that time, the Court stated that if it ultimately found that defendants were not protected by immunity, it would hold them liable for attorney's fees as well as damages.

Plaintiff also requests that the Court reinstate the default judgment for treble damages, prejudgment interest and punitive damages. However, because no trial on the merits was ever held, the Court will instead set this case for trial on an expedited schedule, because plaintiff has already been delayed too long.

V.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants Republic of Nigeria and the Office of the Consulate General of Nigeria are not immune from liability under the FSIA.

2. The consular employees, including defendant A. A. Olalander, are not individually immune from liability.

3. The Court's Order of March 19, 1986, directing defendants to pay all attorney's fees incurred by plaintiff's attorneys, Thayer, Schmid & Aspelin, is reinstated, based on their normal hourly rate. Such payment shall be made on or before September 30, 1986.

4. Trial in this action will begin on December 1, 1986, at 9:00 a.m. A Pretrial Conference will be held on November 20, 1986, at 2:00 p.m.

Dated: August 12, 1986.

WILLIAM N. ORRICK
William N. Orrick
United States District Judge